No. 88-1861

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

1. JAMES STRYKER and HENRY GROSSKLAGS,

Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,

Respondents,

2. THOMAS LOUGHLIN,

Petitioner,

v.

DAVID EUGENE GERSCH,

Respondent,

3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

THEODORE S. HALABY
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May 15, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTIONS PRESENTED

1. Whether the Supremacy Clause requires preemption of state appellate procedures that preclude a public official from exercising his federal substantive right to pretrial appeal of a denial of his immunity from a § 1983 claim.

2. Whether the Privileges or Immunities Clause precludes a state court from infringing a public official's right to qualified immunity from state torts, which immunity the State recognizes, by failing to allow a pretrial appeal of a denial of such right.

II. LIST OF PARTIES

In addition to the parties set forth in the caption, the following parties are also involved in the cases below:

Investigator Kirby Hodgkin;
Summit County Sheriff's Department, Colorado;
Silverthorne Police Department, Colorado;
The Town of Silverthorne, Colorado; and
Klode Towing, Denver, Colorado.

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No. _____

In The

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1. JAMES STRYKER and HENRY GROSSKLAGS,

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WILLIAM EDWARD DECKER and LINDA DECKER,

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2. THOMAS LOUGHLIN,

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DAVID EUGENE GERSCH,

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3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

Petitioners respectfully pray that a writ of *certiorari* issue to review the orders of the Court of Appeals for the State of Colorado denying appellate jurisdiction for pretrial review of a denial of immunity in each of the four cases herein.

OPINIONS BELOW

In each case the court below by minute order and without opinion refused to consider pretrial appellate review of a denial of a public official's qualified immunity, on the grounds it was without jurisdiction to do so.[1] Said orders are found in the appendix hereto.

JURISDICTION

Appeal from the trial court's denial of a claim of immunity by each petitioner was brought before the Court of Appeals for the State of Colorado. In each of the four cases, pursuant to an order to show cause, the Court of Appeals dismissed the appeal. Thereafter, each petitioner applied to the Supreme Court for the State of Colorado seeking *certiorari* review. That court denied review of all the cases on February 13, 1989. This Petition for Certiorari is filed within 90 days of that date.

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[1] Colorado Appellate Rule 1(a)(1) provides "[a]n appeal to the appellate court may be taken from (1) A final judgment of any district . . . court . . . ." The court below found there was no final, appealable judgment.

The jurisdiction of this Court to review the orders of the Colorado Court of Appeals is invoked under 28 U.S.C. § 1257(3).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Amendment Fourteen, § 1: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

All four cases herein concern the right to pretrial appeal of the denial of a public official's entitlement to immunity. In *Stryker v. Decker,* both state tort claims and a federal claim under 42 U.S.C. § 1983 were asserted arising from an alleged false arrest. In *Loughlin v. Gersch,* a state tort claim of malicious prosecution arose from an alleged

false charge of operating a towing vehicle without a city license. The remaining two cases, *City & Co. of Denver v. Hight-Berry* and *Kukuris v. Zapp*, concern state torts arising from police chases in which the fleeing suspect injured the respondent. In all four cases, petitioners asserted in a motion for summary judgment their immunity to either the federal or state claims. The immunity asserted in each case arose under the common law as recognized by this Court in *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967); as recognized by *Cooper v. Hollis*, 42 Colo.App. 505, 600 P.2d 109, 111 (1979), the only Colorado case regarding qualified immunity and which specifically relied upon *Pierson v. Ray;* and as recognized by Colorado's legislative history to its Immunity Act, *Report to the Colorado General Assembly: Governmental Liability in Colorado*, Colorado Legislative Council, research publication no. 134 (November 1968). Petitioners appealed in all cases as a matter of right under *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

In each case, the Court of Appeals issued an order to show cause as to why the appeal should not be dismissed for lack of a final, appealable judgment. In response thereto, petitioners asserted that they possessed a substantive right to pretrial appeal of the denial of their immunity under *Mitchell v. Forsyth, supra*. Petitioners further asserted that a denial of a pretrial appeal would abridge their Fourteenth Amendment due process rights and their rights under the Privileges or Immunities Clause. The Court of Appeals dismissed the appeals upon the order to show cause (Appendix A-2, B-2, C-2, D-2).[2]

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[2] A stamp with handwritten remarks comprises the order dismissing the appeals. The handwriting is reproduced in print.

The Colorado Supreme Court denied *certiorari* in all cases on February 13, 1989 (Appendix A-2, B-2, C-3 and D-3).

REASONS FOR GRANTING THE WRIT

This petition concerns a public official's right to pretrial appeal in state court from the denial of immunity to federal and state claims. This is a matter of first impression for this Court: (1) this Court has never addressed whether state courts under the Supremacy Clause are required to follow federal substantive law relating to the right of a public official to pretrial appeal of a denial of his immunity from suit, and (2) this Court has never addressed whether the Privileges or Immunities Clause gives constitutional protection to immunities recognized in the first instance by state courts. In addition, there is a split among the state courts on whether to grant a pretrial appeal of a denial of immunity against § 1983 claims filed in state court. Finally, as the law is now interpreted in the State of Colorado concerning § 1983 cases, contrary rules protecting the substantive right not to stand trial exist in its federal and state courts.

As this Court recognized in *Mitchell*, 472 U.S. at 526, immunity is "an *immunity from suit* rather than a mere defense to liability . . . " (emphasis in original). In *Mitchell*, this Court equated a civil defendant's right to immunity with a criminal defendant's right to be free from double jeopardy. *Id.* at 525.

In fashioning the qualified immunity right in cases arising under § 1983, this Court has recognized that § 1983 "on its face admits of no immunities, [although

this Court has] read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley v. Briggs*, 475 U.S. at 339. *See also Pierson v. Ray*, 386 U.S. at 556-57, in which this Court first granted the defense of good faith (now known as qualified immunity) to police officers, borrowing from common-law theories. The Colorado case first recognizing good faith, qualified immunity, *Cooper v. Hollis, supra*, also relied on *Pierson*.

The Supremacy Clause preempts state procedures that infringe federal rights, including the right to immunity. This Court has recently held that a State may not apply a notice of claim provision (applicable to state torts) to a § 1983 claim when the notice of claim provision could not be applied against a § 1983 claim asserted in that State's federal court. *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 3202, 101 L.Ed.2d 123 (1988). In so holding, this Court recognized that the equal protection doctrine applicable in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), applied in the reverse context:

> Just as federal courts are constitutionally obligated to apply state law to state claims [citation omitted], so too the *Supremacy Clause imposes on state courts a* constitutional duty "to proceed in such manner that *all substantial rights of the parties under controlling federal law [are] protected.*"

Felder, 108 S.Ct. at 2313 (emphasis added). Because, as pointed out in *Mitchell*, immunity is a substantial right of one of the parties, the state court is required under the Supremacy Clause to protect that right. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material

when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder*, 108 S.Ct. at 2306. As also noted by this Court, " 'Congress . . . surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.' " *Id.* at 2309.

The general principle in *Felder*, which concerned the substantive right of a *plaintiff*, applies with equal force to a civil *defendant*. This principle is self-evident in the petition of *Stryker v. Decker* in which the state appellate court has denied petitioners the pre-trial appellate protection of their substantive right not to stand trial in defense of a § 1983 claim expressly recognized by this Court. Hence, the availability of Petitioners' right depends solely on where the case is filed.

This principle is equally compelling in the remaining three cases precisely because immunity is a common-law right recognized by this Court (and adopted by the Colorado courts) and any protections this Court has recognized regarding that common-law right apply with equal force to both federal and state courts. Guidance from this Court is required not only for state courts but also for federal courts that will be required to consider whether a denial of immunity to a state tort (over which the federal court has pendent jurisdiction) is immediately appealable. Hence, the central issue presented herein involves the strength and universality of a public official's substantive immunity right to be free from the burdens of trial arising in state and federal courts.

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges *or immunities* of citizens of the United States . . . " (emphasis added). The Privileges or Immunities Clause was first discussed in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The opinion therein, and cases following, concerned solely "privileges"; neither this Court nor any other court to petitioners' knowledge has interpreted the phrase "or immunities" as that phrase stands alone, even though the tradition of immunity was firmly rooted in the common law at the time § 1983 and the Fourteenth Amendment were enacted. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

The *Slaughter-House Cases* instruct that privileges or immunities "have always been held to be the class of rights which the State governments were created to establish and secure." 83 U.S. at 76. The State of Colorado has specifically recognized the common-law right of qualified immunity and has enacted the corresponding statutory right based upon the common-law principle that immunity is a defense to suit, not merely a defense to liability.[3] As the *Slaughter-House Cases* made clear, the right must be one initially recognized by the State. This principle is analogous to cases involving an alleged deprivation of a property interest: once a State recognizes an expectation of continued employment, a federal court may intervene and determine whether due process was granted in terminating such employment. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). The same

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[3] *See Report to the Colorado General Assembly, supra.*

principle applies herein: once the State recognizes the common-law right of immunity this Court may ensure that that right is protected under the Privileges or Immunities Clause.

In addition, the entitlement to immunity is fundamental (a prerequisite under the *Slaughter-House Cases* for protection under the Privileges or Immunities Clause, *see* 83 U.S. at 76) as measured by the fact that immunity arises from the earliest traditions of the common law. Consequently, petitioners' immunity asserted herein, recognized by the earliest traditions of the common law and by the State, satisfies those requirements of the *Slaughter-House Cases* and is a right of constitutional character.

The state courts are split on whether a denial of immunity in a § 1983 suit may be immediately appealed. Those cases in accord with *Mitchell* are *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *Breault v. Chairman of Board of Fire Commissioners*, 401 Mass. 26, 513 N.E.2d 1277, *cert. denied* 108 S.Ct. 1078 (1987); *Robinson v. Beaumont*, 725 S.W.2d 839 (Ark. 1987); and *Anderson v. City of Hopkins*, 393 N.W.2d 363 (Minn. 1986).

Those cases which do not follow *Mitchell* in a § 1983 context are *Pizzato's Inc. v. City of Berwyn*, 523 N.E.2d 51 (Ill.App. 1988), *cert. denied* March 7, 1989; *Noyola v. Flores*, 740 S.W.2d 493 (Tex.App. 1987); and *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (1987). *See also* the petition of *Swain v. Lindsey*, No. 88-1168, *cert. denied* March 7, 1989, denying *certiorari* from an unpublished order of the Kentucky Court of Appeals; and *Ansell v. Shannon*, No. 88-394, *cert. denied*

December 5, 1988, denying *certiorari* from an unpublished order of the Colorado Court of Appeals.

Furthermore, there is a split among the States as to whether immunity to a state tort is recognized as an entitlement not to stand trial, thus permitting pretrial appeal. Those granting an immediate appeal are *Elwood v. Rice County*, 423 N.W.2d 671 (Minn. 1988) (pretrial appeal granted for denial of immunity regarding battery claim); *State v. Hogg*, 311 Md. 446 535 A.2d 923 (1988) (pretrial appeal granted regarding denial of sovereign immunity against claim that state mismanaged insurance fund); *Fore v. Circuit Court of Izard County*, 723 S.W.2d 840 (Ark. 1987) (pretrial appeal granted regarding denial of immunity in workmen's compensation context) and *Kaplan v. Pointer*, 501 A.2d 1269 (D.C.App. 1985) (pretrial appeal granted for common-law action of intentional infliction of emotional distress). *See also* unpublished opinion of Ohio Court of Appeals, *Celebrezze v. Netzley*, 1988 W.L. 87566 (Ohio App. 1988)[4] (in a libel case a denial of the immunity recognized by the First Amendment is immediately appealable).

Cases which do not allow pretrial appeal from a denial of immunity to a state tort are *Bollinger by Carraghan v. Obrecht*, 552 A.2d 359 (Pa. 1989) (involving a denial of state statutory immunity arising out of a personal injury which occurred at a school); and *Allen v. Board of Education of Albuquerque*, 748 P.2d 516 (N.M.App.

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[4] Under Ohio's Supreme Court rules for the reporting of opinions, Rule 2(G), this case may be cited as persuasive authority.

1987) (regarding a denial of immunity arising out of an accident occurring at a school).

Of course, there is also a split between this Court and those state courts, above, that do not follow the rule set forth in *Mitchell*. Petitioners have found no cases in which a federal court of appeals has addressed whether a denial of immunity to a state tort filed in federal court is immediately appealable.

This petition raises complex matters of federalism requiring the intervention of this Court. Because § 1983 suits present a unique mix of common-law and federal principles, this Court must determine if it is the final arbiter of those common-law, as well as federal, principles. Second, if state courts are allowed to apply their own rules in derogation of those rules recognized by federal courts, § 1983 defendants will be compelled to remove *all* § 1983 actions to federal courts to insure that their rights are recognized. *See* Welch, *Qualified Immunity & State Torts*, 8 Rev. of Litigation 53, 65 (1988). Wholesale removals will further clog the federal courts and defeat the policy of promoting state court jurisdiction of § 1983 claims. Third, this Court must establish the parameters of the pretrial appellate protection afforded the common-law immunity principle it has recognized, and whether immunity, given its longstanding history, is granted constitutional protection under the Privileges or Immunities Clause.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

THEODORE S. HALABY
Counsel of Record

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APPENDIX A

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-0693

RESPONSE TO ORDER TO SHOW CAUSE

WILLIAM EDWARD DECKER and LINDA DECKER,
Plaintiffs-Appellees,

v.

JAMES STRYKER and HENRY GROSSKLAGS,
Defendants-Appellants,

and

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, SILVERTHORNE POLICE DEPARTMENT and the CITY OF SILVERTHORNE, COLORADO,

Defendants.

HALABY & McCREA

Theodore S. Halaby #2232
Robert M. Liechty #14652
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Telephone: (303) 691-5300

ATTORNEYS FOR
DEFENDANTS-APPELLANTS
STRYKER AND GROSSKLAGS

Appeal Dismissed

November 3, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC633
Certiorari to the Colorado Court of Appeals 88CA0693
Summit County District Court 86CV323

ORDER OF COURT

JAMES STRYKER and HENRY GROSSKLAGS,
Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,
Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

APPENDIX B

COLORADO COURT OF APPEALS

No. 88CA0538

DAVID EUGENE GERSCH, Plaintiff-Appellee, v. OFFICER THOMAS LOUGHLIN, Defendant-Appellant.	)	ORDER TO SHOW CAUSE (Trial Ct. No. 85CV11869)

To: Officer Thomas Loughlin and his attorneys, Theodore S. Halaby and Robert M. Liechty

From the notice of appeal filed by appellant and the register of actions submitted by the clerk of the district court, it appears that the appeal is from an order denying a motion for summary judgment and that, therefore, there is not yet a final appealable judgment. *See Glennon Heights, Inc. v Central Bank & Trust,* 658 P.2d 872 (Colo. 1983); *Manuel v. Fort Collins Newspapers, Inc.,* 631 P.2d 1114 (Colo. 1981).

Alternatively, it appears that the trial court directed entry of a written order, but that none has been prepared or executed by the trial court. Thus, there may not yet be a final, appealable judgment. *See* C.R.C.P. 58(a).

It is THEREFORE ORDERED that appellant shall show cause, if any he has, in writing on or before September 23, 1988, why this appeal should not be dismissed without prejudice for lack of a final, appealable judgment.

Dated: September 6, 1988

APPEAL DISMISSED

BY THE COURT

September 30, 1988

Having considered the response to this order, it is ordered that the appeal is dismissed.

Smith, J.
Plank, J.
Marquez, J.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC577
Certiorari to the Colorado Court of Appeals 88CA0538
Denver District Court 85CV11869

ORDER OF COURT

OFFICER THOMAS LOUGHLIN,
Petitioner,

v.

DAVID EUGENE GERSCH,
Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

APPENDIX C

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-1393

APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE

JO ANN HIGHT-BERRY,

Plaintiff-Appellee,

v.

THE CITY AND COUNTY OF DENVER, a municipal corporation; MAYOR FEDERICO PENA, individually and in his official capacity as Mayor; CHRIS HOAG, individually and in their official capacity as members of the Police Department of the City and County of Denver; CHIEF THOMAS COOGAN, Chief of the Denver Police Department, individually and in his official capacity as Chief of Police; and J. D. MacFARLANE, individually and in his official capacity as Manager of Safety of the City and County of Denver, State of Colorado,

Defendants-Appellants.

Appeal From The District Court
For The City And County Of Denver
Civil Action No. 85-CV-13543
The Honorable J. Stephen Phillips Presiding

HALABY & McCREA

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ATTORNEYS FOR
DEFENDANTS-APPELLANTS

Appeal Dismissed

November 3, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC632
Certiorari to the Colorado Court of Appeals 88CA1393
Denver District Court 85CV13543

ORDER OF COURT

THE CITY AND COUNTY OF DENVER, a municipal corporation; MAYOR FEDERICO PENA, individually and in his official capacity as Mayor; CHRIS HOAG, individually and in his official capacity as a member of the Police Department of the City and County of Denver; CHIEF THOMAS COOGAN, Chief of the Denver Police Department, individually and in his official capacity as Chief of Police; and J.D. MacFARLANE, individually and in his official capacity as Manager of Safety of the City and County of Denver, State of Colorado,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review

of the record, the briefs, and the opinion of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

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APPENDIX D

COURT OF APPEALS, STATE OF COLORADO

Case No. 88-CA-1141

APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE

JERRY ZAPP and RUTH ZAPP,

Plaintiffs-Appellees,

v.

JAMES KUKURIS, JOHN SPEZZE, KEITH L. COWGILL, JOHN PRICE, and "JOHN DOE," POLICE OFFICERS OF THE CITY AND COUNTY OF DENVER, Individually; and THE CITY AND COUNTY OF DENVER, COLORADO, a Colorado Municipal Corporation,

Defendants-Appellants,

and

M.P. KELLY, TIMOTHY O'BRIEN, "JOHN DOE", POLICE OFFICERS OF THE CITY OF AURORA, Individually; THE CITY OF AURORA, COLORADO, a Colorado Municipal Corporation; and PHILLIP GOGGIN,

Defendants.

HALABY & McCREA

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Denver, Colorado 80222
Telephone: (303) 691-5300

ATTORNEYS FOR
DEFENDANTS-APPELLANTS
KUKURIS, SPEZZE, COWGILL,
PRICE AND THE CITY AND
COUNTY OF DENVER

Appeal Dismissed

Oct. 4, 1988

Appeal dismissed, without prejudice, for lack of a final, appealable judgment.

By the Court

Smith, Plank & Marquez, JJ.

Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 88SC578
Certiorari to the Colorado Court of Appeals 88CA1141
Denver District Court 88CV1831

ORDER OF COURT

JAMES KUKURIS, JOHN SPEEZE, KEITH L. COWGILL, JOHN PRICE, and "JOHN DOE," POLICE OFFICERS OF THE CITY AND COUNTY OF DENVER, Individually; and THE CITY AND COUNTY OF DENVER, COLORADO, a Colorado Municipal Corporation,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 13, 1989.

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No. 88-1861

Supreme Court, U.S.
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JUN 12 1989
JOSEPH F. SPANIOL, JR
CLERK

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Respondent.

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,
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JERRY ZAPP and RUTH ZAPP,
Respondents.

BRIEF OF RESPONDENTS WILLIAM EDWARD DECKER AND LINDA DECKER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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June 12, 1989

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I. QUESTION PRESENTED

Have subsequent orders by the trial court rendered moot the questions raised by petitioners Stryker and Grossklags.

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JURISDICTION

Subsequent to the decision of the Colorado Court of Appeals dismissing the appeal taken by Stryker and Grossklags, the trial court entered an order dismissing respondents' claims under 42 U.S.C. § 1983 [Appendix A]. The trial court later granted respondents' leave to file a Third Amended Complaint stating new claims under 42 U.S.C. § 1983 [Appendix B]. The order by the trial court dismissing these respondents' claims under 42 U.S.C. § 1983 has rendered moot the questions raised by petitioners Stryker and Grossklags. Though new claims under 42 U.S.C. § 1983 have been stated against petitioners Stryker and Grossklags, review of assertions of immunity from trial on those new claims is not ripe since no decision has been made by the trial court or the Colorado Appellate Courts as to whether petitioners Stryker and Grossklags are entitled to immunity on the new claims.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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DISTRICT COURT, COUNTY OF SUMMIT,
STATE OF COLORADO
Civil Action No. 86 CV 323

ORDER

(Filed April 17, 1989)

WILLIAM EDWARD DECKER and LINDA DECKER,

Plaintiffs,

vs.

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, JAMES STRYKER, HENRY GROSSKLAGS, SILVERTHORNE POLICE DEPARTMENT and THE CITY OF SILVERTHORNE, COLORADO,

Defendants.

THE COURT, having considered Defendants Kirby Hodgkin's and the Summit County Sheriff Department's (Sheriff Department's) Motion for Summary Judgment and the Response and Reply, along with the pleadings and exhibits appended to these documents,

AND BEING fully advised in the premises, enters the following findings and Order:

1. Hodgkin and the Sheriff's Department move for summary judgment in their favor and against Plaintiffs arguing:

a. Defendant Hodgkin is entitled to qualified good faith immunity;

b. A public employee is liable for only willful and wanton actions and the evidence does not support any such acts or omissions;

c. Summit County and not the Summit County Sheriff's Department is the proper Defendant;

d. Summit County enjoys sovereign immunity pursuant to C.R.S. 24-10-108 and is therefore immune from suit; and

e. Plaintiffs have failed to plead the existence of a policy or custom required to sustain a claim based on 42 USC 1983.

2. Hodgkin argues that qualified immunity acts to shield law enforcement officials from civil liability where a reasonable but mistaken belief exists as to the presence of probable cause to arrest or search. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986). He further argues that where a law enforcement officer exercises his judgment in making difficult determinations, and where his judgment is objectively reasonable, he should not be held personally liable in damages. *Anderson v. Creighton*, 483 U.S.___, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988).

3. Hodgkin also argues that where the defendant's subjective intent is an element of the plaintiff's claim and the defendant moves for summary judgment based upon a showing of the objective reasonableness of his action, *the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. Pueblo, supra.*

4. Lastly, Hodgkin argues that a public employee shall not be liable for injuries unless his actions were willful and wanton pursuant to CRS 24-10-105 and Plaintiffs have failed to support their allegations with any specific facts tending to show willful and wanton behavior. *See Pueblo, supra.*

5. The Sheriff's Department argues Summit County is the appropriate defendant and that as such it is, nevertheless, a public entity immune from any state tort claims. The Sheriff's Department also argues Summit County has not waived immunity.

6. Lastly, the Sheriff's Department argues Plaintiffs have failed to allege a custom or policy on the part of the Sheriff's Department or Summit County required by 42 USC 1983 which caused Plaintiffs to be deprived of the constitutionally protected right to be free from unreasonable searches and seizures.

7. Plaintiffs incorporate by reference their Response and exhibits included in their response to the Silverthorne Defendants Motion for Summary Judgment previously decided. Plaintiffs argue genuine questions of fact exist as to:

a. Whether Plaintiff Decker resembled the subject fugitive's picture and description;

b. Whether the time Plaintiff was detained was reasonable under the circumstances;

c. Whether the dispatcher broadcasted a description of the fugitive Decker and whether the recording of the dispatch was destroyed to cover-up evidence of misconduct;

d. Whether the Sheriff's Department maintains a policy which calls for officers to arrest persons with names similar to the name of a wanted person without further inquiry as to whether the person to be arrested is the same person as the wanted person;

e. Whether the dispatcher directs the arrest;

f. Whether the individual Defendants were acting within the scope of their duties; and

g. That in light of the Court's previous Order denying summary judgment the present motion for summary judgment is frivolous.

8. Defendants herein reply that Plaintiffs' response lacks authority and speculates on facts which are unsupported by *any* evidence in the record. Defendants argue that suits against government officials impel the application of a standard more demanding of plaintiffs when public official defendants move for summary judgment on the basis of their qualified immunity. Defendants reassert that Plaintiffs may avoid summary judgment *only* by *pointing to specific evidence* that the official's actions were improperly motivated. *Pueblo, supra*. Defendants argue that Plaintiffs' dreamed up facts and inferences drawn from such facts do not "specifically point" to conduct which was not "objectively reasonable" on the part of Hodgkins or the Sheriff's Department.

9. The Court finds Defendants' Hodgkins and the Sheriff Department's Motion for Summary Judgment meritorious in part. The Court finds the Sheriff's Department is a public entity and as such is immune from any state tort claims alleged by Plaintiffs pursuant to CRS

24-10-105 and 106. The Court therefore dismisses Plaintiffs' First, Second and Third Claims for relief which allege state tort claims against the Summit County Sheriff's Department.

10. Next, the Court finds questions of fact exist precluding summary judgment in favor of Defendant Hodgkin against the Plaintiffs with regards to Plaintiffs' state tort claims. Pursuant to CRS 24-10-105 the Court finds questions of fact may exist as to whether Defendant Hodgkin has good faith, qualified immunity immunizing him against Plaintiffs' First, Second and Third Claims for Relief. The Court finds factual questions may also exist as to whether Defendant Hodgkin's complained of acts or ommissions were "willful and wanton" pursuant to CRS 24-10-105 thus summary judgment is improper at least at this time.

11. Lastly, as to Plaintiffs' Fourth and Fifth Claims, the Court finds conduct by persons or entities which is properly plead as wrongful under 42 USC 1983 cannot be immunized by state law. However, the Court finds particular and specific facts alleging a policy or custom on behalf of the individual and/or entity allegedly violating Plaintiffs' constitutionally protected right must be plead.

12. Upon reviewing Plaintiffs' Fourth and Fifth Claims for Relief, the Court concludes no policy or custom is alleged in Plaintiff's Second Amended Complaint against any of the Defendants. The Court finds it erroneously previously found Plaintiffs had plead such required policy or custom when, in fact, Plaintiffs had merely argued the possible existence of such policy or custom. The Court now concludes Plaintiffs have failed to

allege by any specific facts the real existence of any such policy or custom against *any* of the Defendants. The Court thus determines dismissal of Plaintiffs' Fourth and Fifth Claims alleging 42 USC 1983 claims against all the Defendants proper.

13. The Court thus dismisses Plaintiffs' state and federal claims against the Sheriff's Department; dismisses Plaintiffs' Fourth and Fifth Claims against all Defendants; denies Defendant Hodgkins' Motion for Summary Judgment as to Plaintiffs' First, Second and Third Claims for Relief; and amends its Order entered April 12, 1988 consistant with the findings and Order herein.

DONE AND SIGNED this 17th day of April, 1989.

BY THE COURT:

/s/ W. Terry Ruckriegle
W. Terry Ruckriegle, District Judge

DISTRICT COURT, COUNTY OF SUMMIT,
STATE OF COLORADO
Civil Action No. 86 CV 323

ORDER
(Filed May 11, 1989)

WILLIAM EDWARD DECKER and LINDA DECKER,

Plaintiffs,

vs.

INVESTIGATOR KIRBY HODGKIN, SUMMIT COUNTY SHERIFF'S DEPARTMENT, JAMES STRYKER, HENRY GROSSKLAGS, SILVERTHORNE POLICE DEPARTMENT and THE CITY OF SILVERTHORNE, COLORADO,

Defendants.

THE COURT, having considered Plaintiffs' Motion to Reconsider, Modify and Correct Order for Certification under Rule 54(b) and to Further Amend Complaint and the Responses thereto,

AND BEING fully advised in the premises, enters the following findings and Order:

1. The Court has considered the Plaintiffs' proposed Third Amended Complaint submitted with their above titled motion. The Court finds therein Plaintiffs have, for the first time, alleged by specific facts and not merely by counsel's unsupported arguments, the existence of not only a custom or policy but other specific acts which, if proven, would allow relief to be granted in Plaintiffs favor and against the named Defendants.

2. The Court also notes Plaintiffs have admitted their inability until the present to precisely articulate their federal claims against the Defendants. *See* Plaintiffs' Motion to Reconsider, page 4, paragraph 7.

3. The submitted Third Amended Complaint represents Plaintiffs' fourth attempt to plead sufficient facts to support a claim under 42 USC 1983. The Court recognizes that an enormous amount of time and expense has been incurred by all parties herein due at least in part to Plaintiffs pleading.

4. The Court further finds the case has not been set for trial even though it was filed nearly three years ago.

5. The Court has also considered its own error in determining that a custom or policy was required to support a claim based upon 42 USC 1983 against the individually named Defendants.

6. Having considered the above circumstances, and considering that leave to file amended complaints shall be freely given when justice so requires pursuant to C.R.C.P. Rule 15, the Court finds it has little choice but to allow Plaintiffs to file the submitted Third Amended Complaint. The Court shall allow such Third Amended Complaint to be filed, however, only as to the individually named Defendants. The Court determines significant prejudice would result to the previously dismissed public entities if it were to allow Plaintiff's Third Amended Complaint to be filed against these Defendants at this time. In conjunction herewith, the Court certifies the portion of its previous Order dismissing the Defendant public entities as final pursuant to Rule 54(b).

7. The Court thus grants Plaintiffs Motion to Reconsider and to file the Third Amended Complaint, and to Certify the previous dismissal of Defendants Summit County Sheriff's Department, Silverthorne Police Department and The City of Silverthorne as final pursuant to Rule 54(b).

DONE AND SIGNED this 11th day of May, 1989.

BY THE COURT:

/s/ W. Terry Ruckriegle
W. Terry Ruckriegle, District Judge

No. 88-1861

In The
Supreme Court of the United States
October Term, 1988

Supreme Court, U.S.
FILED
JUN 22 1989
JOSEPH F. SPANIOL, JR
CLERK

1. JAMES STRYKER and HENRY GROSSKLAGS,

Petitioners,

v.

WILLIAM EDWARD DECKER and LINDA DECKER,

Respondents,

2. THOMAS LOUGHLIN,

Petitioner,

v.

DAVID EUGENE GERSCH,

Respondent,

3. CITY AND COUNTY OF DENVER, MAYOR FEDERICO PENA, OFFICER CHRIS HOAG, CHIEF THOMAS COOGAN and J.D. MacFARLANE,

Petitioners,

v.

JO ANN HIGHT-BERRY,

Respondent,

4. JAMES KUKURIS, JOHN SPEZZE, KEITH COWGILL, JOHN PRICE and the CITY AND COUNTY OF DENVER,

Petitioners,

v.

JERRY ZAPP and RUTH ZAPP,

Respondents.

REPLY BRIEF TO RESPONDENTS WILLIAM AND LINDA DECKER

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ARGUMENT

The respondents in *Stryker v. Decker* assert in their brief in opposition that the petition as to their claims is moot because the trial court entered an order dismissing respondents' claims under 42 U.S.C. § 1983 and that the petition is not ripe because the courts below have not ruled on the claims asserted in the Third Amended Complaint. Such is groundless.

First, the instant petition concerns petitioners' entitlement to interlocutory appeal from a denial of immunity as to both federal *and* state claims asserted by respondents. The trial court's order did not address the state tort claims.

As it concerns respondents' § 1983 claims against petitioners, the trial court took the following series of actions:

a. It initially denied petitioners' motion for summary judgment based on their immunity to both the state and federal claims on the grounds there was a dispute as to material fact.

b. Pursuant to a motion for summary judgment by defendants Hodgkin and Summit County Sheriff Department (not parties to the instant petition) filed while the instant matter was on appeal, the trial court inexplicably dismissed the § 1983 claims against petitioners because "no policy or custom" was alleged against petitioners. (*See* respondent Deckers' appendix at 5, ¶ 12)

c. However, the trial court, realizing its error in requiring allegations of custom and policy with respect to

§ 1983 claims against individually named defendants, "considered its own error" in this regard and granted leave to respondents to file a Third Amended Complaint. (*See* respondent Deckers' appendix at 8, ¶¶ 5 and 6)

d. Respondents filed their Third Amended Complaint in which they reasserted the state tort claims and § 1983 claims previously asserted in their Second Amended Complaint, and, in addition, asserted one new § 1983 claim against the entities and two new state tort claims. Respondents do not claim that the alleged facts or claims set forth in the Third Amended Complaint are different from those previously set forth in the Second Amended Complaint.

Respondents are technically correct that their reasserted § 1983 claims contained in their Third Amended Complaint have not been formally ruled upon by the trial court and the Colorado Court of Appeals. However, the record is clear that such claims, as they pertain to these petitioners, are identical to those claims asserted in the Second Amended Complaint that the trial court ultimately refused to dismiss, and which were the subject of the appeal to the Colorado Court of Appeals.

Plainly, the doctrine of mootness is inapplicable to the instant petition. "In general, a case becomes moot ' "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." ' " *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). It is clear that the issue concerning Colorado appellate jurisdiction of an interlocutory appeal from a denial of immunity to claims asserted against petitioners is still "live." The Colorado Court of Appeals refused jurisdiction over

the appeal "for lack of a final, appealable judgment." *See*, Petition, A-2. Thus, the only issue before this Court is whether the Colorado Court of Appeals infringed petitioners' rights by refusing such jurisdiction.

The issue is also ripe under Article III because a "final decision" has been rendered by the district court concerning petitioners' immunity, "notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In the same light, the Court of Appeals has also rendered a final decision concerning the appellate protection of the petitioners' right not to stand trial. Hence, this Court will not become entangled in premature adjudication of whether a state appellate court must take jurisdiction over a denial of immunity because the Colorado Court of Appeals has issued its final word on the subject. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). It would be a futile exercise to reapply to either court below because the same result would issue under the law of the case: the trial court would hold disputed issues of fact preclude a ruling on immunity and the Colorado Court of Appeal would deny jurisdiction "for lack of a final, appellate judgment."

CONCLUSION

For the reasons stated herein, the petition of James Stryker and Henry Grossklags has not been rendered moot and is ripe for consideration of whether the Colorado Court of Appeals erred in not accepting interlocutory jurisdiction over a denial of immunity.

Respectfully submitted,

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